Supreme Court, U.S.
FILED
JUN 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 74, Original

# In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF GEORGIA, PLAINTIFF

*v.*

STATE OF SOUTH CAROLINA

*ON THE REPORT OF THE SPECIAL MASTER*

## MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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The "Second and Final Report" (Report) of Special Master Walter E. Hoffman in this case, filed on March 31, 1989, assumes, unnecessarily and incorrectly in our view, that the United States has utilized so-called "straight baselines" in constructing the coast line at the mouth of the Savannah River (Report at 12-14). The use of straight baselines is authorized by Article 4 of the Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, art. 4, 15 U.S.T. 1606, T.I.A.S. No. 5639 (the Convention), which supplies the principles for locating the coast line of the United States.[1] However, Article 4 is an

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[1] Article 4 provides in pertinent part:

1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate

optional provision of the Convention, to be utilized in limited geographic circumstances. The use of straight baselines to locate the coast line of the United States is contrary to a longstanding and consistent position of the United States, repeatedly recognized and upheld by this Court. The United States brings the Special Master's erroneous assumption to the Court's attention in order to suggest that the Court indicate in its opinion in this case that it does not adopt that assumption.

1. The most recent phase of this litigation concerns the construction of an offshore lateral boundary dividing the jurisdictions of Georgia and South Carolina from their common boundary at the mouth of the Savannah River to the three-mile limit. Since such boundaries often depend on the location of the coast line, the federal government followed the litigation to assure that neither party took a position inconsistent with that of the United States as to the location of either the coast line or the three-mile limit. Neither did; instead, both parties adopted the federal coast line for purposes of their theories of the case. Report at 4-5, 12. Moreover, the parties specifically stipulated that federal interests would not be affected by any decision in this case. Report, Stipulation Appendix. Accordingly, the United States did not participate in the proceedings before the Special Master, and continues to take no position in this Court on the boundary dispute between the parties.

The coast line in question is that segment between Tybee Island and Hilton Head Island. It is a straight line delimit-

points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.



ing the inland waters of Tybee Roads. The Special Master assumes in his discussion of the line that it is an Article 4 straight baseline (Report at 12-14), although that assumption is not necessary to his reasoning or conclusions. In fact, the line (which is correctly located by the Special Master) is a traditional bay closing line drawn pursuant to Article 7 of the Convention.[2]

The Special Master's discussion of straight baselines in this case is apparently the result of ambiguous testimony. We understand that two witnesses referred to the Tybee Island-Hilton Head closing line as a "straight baseline". It is so only in the sense that bay closing lines drawn pursuant to Article 7 of the Convention are "straight", not because it was constructed pursuant to Article 4.[3]

[2] Article 7 provides in pertinent part:

2. [A] bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. • • •

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. • • •

[3] The Special Master refers to 1 A. Shalowitz, *Shore and Sea Boundaries* 203-236 (1962) on the limitations on straight baseline use (Report at 12-13). That expert does not suggest, in the quoted material or elsewhere, that such baselines are used to define the coast of the United States. See, *e.g.*, 1 A. Shalowitz, *supra*, at 206.

In addition, the Special Master assumes that the federal interagency Baseline Committee was applying Article 4 criteria when it drew the Tybee Island-Hilton Head line (Report at 13), although he notes that "the Baseline Committee gave no particular emphasis to the configuration of the coast in establishing" the line (*id.* at 14). But an Article 7 bay closing line, unlike an Article 4 line, is not constrained by the general direction of the natural coast line in the vicinity. We have reviewed the minutes of the Baseline Committee and, as would be

2. The Special Master's use of the straight baseline analysis is, in any event, clearly at odds with the position heretofore taken by the Court and its Special Masters in other cases.

This Court has been both consistent and clear in recognizing that the Executive Branch does not employ Article 4 of the Convention in the construction of the coast line of the United States, and has repeatedly upheld that position. In the California tidelands case, the Court observed that Article 4 was optional and could not be imposed on the federal government by the States. *United States* v. *California*, 381 U.S. 139, 168 (1965). In the related Louisiana case, although it acknowledged that the straight baseline method is well suited to that State's geography, the Court refused to impose its use on the Executive Branch, one of "the branches of Government responsible for the formulation and implementation of foreign policy". *United States* v. *Louisiana* (*Louisiana Boundary Case*), 394 U.S. 11, 73 (1969).

This Court's Special Masters have repeatedly reached the same conclusion. Louisiana was given an opportunity to prove the use of straight baselines and could not. Report of the Special Master at 5-13, *United States* v. *Louisiana*, No. 9, Orig. (July 31, 1974). Florida previously had made similar arguments. Judge Maris, sitting as Special Master, concluded that "[t]he evidence in this case conclusively establishes that the United States has not adopted the straight baseline method with respect to the

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expected, find no indication that the Tybee Island to Hilton Head line was constructed as an Article 4 straight baseline—a construction which would, in any case, have been beyond the authority of the Committee, since the Committee is authorized only to apply United States policy in its coast line construction, not to adopt a wholly new system of delimitation. It is, accordingly, clear that the Tybee Island-Hilton Head line is an Article 7 bay closing line.



determination of the coastline of the State of Florida." Report of the Special Master at 49, *United States* v. *Florida*, No. 52, Orig. (Jan. 18, 1974). Judge Hoffman himself, sitting as Special Master in *United States* v. *Maine (Massachusetts Boundary Case)*, recognized that "[e]ven though the straight baseline system might be appropriate to some parts of the coasts of the United States, the Federal Government has not elected to apply the system to delineate the baseline of the United States. Moreover, the Supreme Court has held that the decision to use Article 4 'rests with the Federal Government, not with the individual States' [citing *California* and *Louisiana*]. Accordingly, the straight baseline system of Article 4 is inapplicable to this proceeding." Report of the Special Master at 6 (Jan. 13, 1984). The same conclusion was reached most recently in that portion of No. 9, Original which dealt with Mississippi Sound. *United States* v. *Louisiana* (*Alabama and Mississippi Boundary Case*), 470 U.S. 93, 99 (1985); Report of the Special Master at 7.

In short, in this case the Special Master has—perhaps inadvertently—suggested that the United States employs a baseline system which in fact it has avoided adopting for many years. The discussion of this point does not appear to be essential either to the Master's ultimate decision or to the rationale supporting it. Nevertheless, since the federal government has, with this Court's approval, consistently refused to adopt the optional methods described in Article 4 of the Convention, and has had to defend against assertions by the coastal states that they have been used (see,

for example, Alaska's pending contentions in No. 84, Orig.), we submit that the Master's error should not go uncorrected. We therefore suggest that the Court indicate in its forthcoming opinion that it does not adopt that portion of the Master's discussion.

Respectfully submitted.

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JUNE 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00315